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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1949.

No. 754.

THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees*.

REPLY TO MOTION TO AFFIRM.

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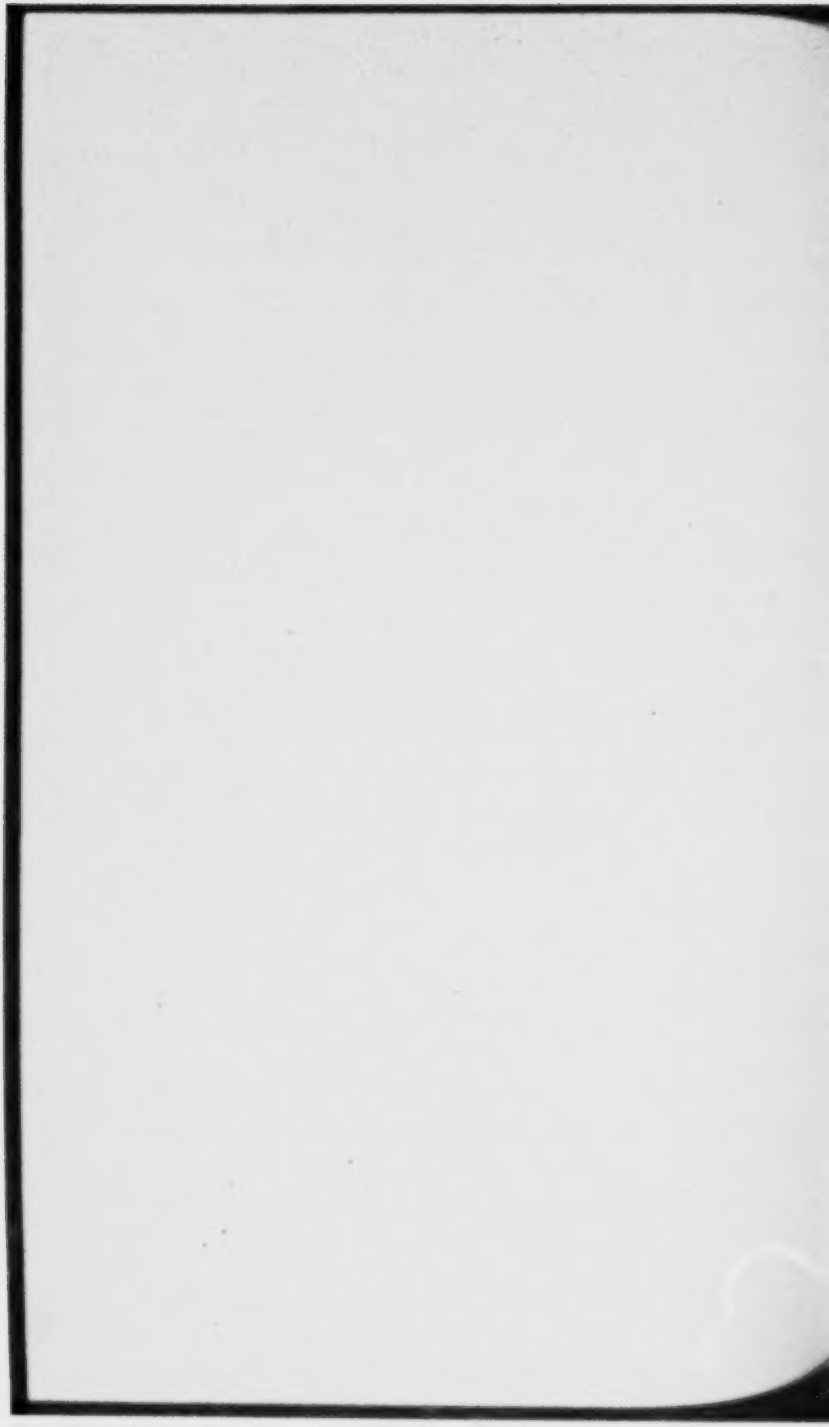

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THE EMERY TRANSPORTATION COMPANY, *Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*

REPLY TO MOTION TO AFFIRM.

This is the reply of the Emery Transportation Company, plaintiff-appellant, hereinafter referred to as Appellant, to the motion to affirm filed by the United States of America and the Interstate Commerce Commission, defendants-appellees, hereinafter referred to as Appellees, pursuant to Rule 12, paragraph 3 of the Revised Rules of the Supreme Court of the United States.

The statement of the case, as set forth by Appellees on pages 1 and 2 of their Motion, appears to be substantially correct. However, it omits one fact which is of extreme importance in the final adjudication of this cause. Appellees, in their Motion to Affirm, point out that Appellant purchased the operating rights here under consideration, from Jeffersonville, Ind. to Chicago, Ill., from the Nowak Trucking Company, and that such purchase was authorized by the

Commission in *Emery Transportation Co.—Purchase—Nowak Trucking Co.*, 40 M. C. C. 845 and 45 M. C. C. 805. It is also pointed out by Appellees that Appellant purchased the operating rights from Chicago, Ill. to points and places in Wisconsin from the Midwest Transfer Company of Illinois, and that such purchase was authorized by the Commission in *Emery Transportation Co.—Control and Merger*, 50 M. C. C. 433, but Appellees did not point out to the Court that the Commission in approving the purchase of the operating rights from the Midwest Transfer Company of Illinois, specifically permitted and authorized Appellant to unify these rights with those already confirmed in it, and that the rights already confirmed in it were those which were previously purchased from the Nowak Trucking Company. The Commission, in approving the transaction stated that: ". . ., the Emery Transportation Company will be entitled to a permit covering the described portion of the operating rights granted in No. MC-107640 (those purchased from Midwest) which rights are herein authorized to be unified with rights otherwise confirmed in it, with duplications eliminated." (See page 8 of Appendix B attached to the Complaint.)

Appellees contend that this appeal presents no substantial questions; that the only issue "presented is whether a contract carrier possessing separate operating rights can without obtaining specific operating authority therefor combine the same so as to render through service between the origin point on one route and the destination points on the other."

Appellant respectfully submits that there are substantial questions involved in this appeal and, further, that Appellees have misstated the issue which is presented to the Court. The statement of the issue as presented by Appellees presupposes that Appellant has two separate operating permits which it acquired without knowledge of the Interstate Commerce Commission or without the Commission ever having had an opportunity to approve or disapprove

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the acquisition of such permits. These two suppositions are entirely erroneous. Appellant has but one permit, which includes the authorities here under consideration, as well as others. Prior to the time it purchased either one of the authorities involved in this case, it filed an application with the Interstate Commerce Commission for approval of the transaction. These applications were set down for public hearings, after which and as a result of the factual records made at such hearings, the Commission found it consistent with the public interest for Appellant to purchase these rights and consistent with the public interest for Appellant to unify these rights with those already confirmed in it. The issue before the Court, therefore, is not whether a contract carrier possessing separate operating rights can combine the same so as to render through service, but whether Appellant, who has been authorized to unify operating rights authorizing transportation services from Jeffersonville, Ind. to Chicago, Ill., and from Chicago, Ill. to points in Wisconsin, may consider such rights as one and unite the same for the purpose of performing a service from Jeffersonville, Ind. through Chicago, Ill. to points in Wisconsin, upon the basis of rates which it has proposed. To decide this issue, it would seem that it would be necessary to ascertain what Appellant was permitted to do when the Commission authorized it to unify the rights purchased from Midwest with those which it had previously purchased from Nowak, and to determine whether once the Commission in a case has permitted the unification of operating rights, it can, in a subsequent case, prohibit the combination or combining of the rights which it has already authorized to be unified.

Appellees attempted, in their reply brief filed with the Lower Court, to ascribe a special or particular meaning to the words "to be unified" by attaching to such brief a memorandum from the Bureau of Motor Carriers to the Chief Counsel of the Interstate Commerce Commission, wherein the Director attempted to given an interpretation

of what the members of the Interstate Commerce Commission meant by the use of this term. There is nothing in the Interstate Commerce Act which indicates that the verb "unify" is to be given an unusual meaning nor in the transportation industry does it have any special significance so as to be considered a word of art. The word, therefore, should be given the common or ordinary meaning usually ascribed to it. *A. Magnano Company* v. *Hamilton, Atty. Gen., et al,* 292 U. S. For the ordinary meaning of the word we must refer to a standard dictionary. According to Webster's New International Dictionary, the word "unify" means to "cause to be one or uniform; to make into a unit; to unite; to view as one." "Unify" is derived from the Latin "unus," meaning "one," and "facere," meaning "to make." An accurate interpretation, therefore, of the Latin root of the word would be "to make one," which is one of the definitions used by Webster. The ordinary meaning to ascribe to the word "unify" would seem to be "to make one" or "to unite." The term "to be unified," therefore, would seem to mean "to be made one" or "to be united." Accordingly, the Commission, when it authorized Appellant to purchase the operating rights of Midwest, not only approved the transaction but authorized Appellant to make or use the rights as one, or to unite them with other rights previously confirmed in it. The ordinary definition of the word "unify" is not a stranger to the Courts for in *Adams et al* v. *Salt River Valley Water Users' Assn.,* 89 Pac. (2nd) 1060, 1071, the Supreme Court of Arizona, considered a contract which contained this word. The contract had stated, "The object and purpose . . . is to provide and execute a general plan for unified operation". The Court quoted Webster as follows: "That unify means: 'To cause to be one; to make into a unit; to unite. . . . To become one; to consolidate.' And that unified means 'made one' ".

If Appellant has been permitted by the Commission to unite, or to make the operating rights in question one, there can be little doubt but that the Commission, in the purchase

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transaction, authorized the performance of transportation services from Jeffersonville through Chicago to points in places in Wisconsin. Appellees undoubtedly recognized this fact for, in presenting to the Court their idea of the issues involved in the case, they were very careful to point out that the contract carrier in question had two separate operating rights. If we are to give any meaning whatsoever to that portion of the Commission's Order permitting the unification of the operating rights, we cannot consider that the rights here in question are separate one from the other.

Appellees, in stating the issue of the case, indicate that the question before the Court is whether Appellant may combine the operating rights in question. If it is admitted that the Commission has already authorized these rights to be unified, and it would seem that such an admission is inescapable, it must also be concluded that the Commission has authorized that these rights be combined, for the two words "unify" and "combine" mean exactly the same thing. Webster's New International Dictionary defines the word "combine" to mean "to unite or join." As previously indicated, the same dictionary defines "unify" to mean "unite." It would seem, therefore, that if the Commission has authorized the operating rights here in question to be unified, it has also authorized these rights to be combined. The question, therefore, is not whether Appellant may unify or combine these operating rights, but whether the Commission, after authorizing such action, may, in a subsequent case, where Appellant is attempting to do that which the Commission has authorized, may find the action to be unlawful.

The Commission, by authorizing that the rights here in question be unified or made as one, authorized the performance of a through transportation service from Jeffersonville, Ind. through Chicago to points in Wisconsin. Its Order in the instant case, finding rates providing for this service to be unlawful because they exceed the scope of the operating permit, amounts to a taking of property with-

out due process of law, contrary to the provisions of the Constitution.

The instant case presents to the Court the same legal questions which are involved in the *Texas and Pacific Motor Transport Company* v. *United States of America and Interstate Commerce Commission*, 87 Fed. Supp. 107, and the *Rock Island Motor Transit Company* v. *United States of America and Interstate Commerce Commission*, Decided November 29, 1949, U. S. Dist. Court, Northern District of Illinois, Eastern Division (7 Federal Carrier Cases 80,573 CCH), not yet printed in the Federal Reporter System. In both of these cases, the plaintiffs were subsidiaries of railroads engaged in transporting property by motor vehicle. They had both purchased certain certificates of public convenience and necessity from others, pursuant to approval received from the Interstate Commerce Commission. Subsequent to the approval, the Commission attempted to impose on the certificates held by the carriers certain conditions, one of which was the so-called "keypoint restriction" which would prohibit the carriers from transporting property through or between certain points authorized to be served by their certificates. Rock Island Motor Transit Co., for example, had purchased a certificate which authorized services over routes between Chicago, Ill. and Omaha, Neb. It had also purchased another certificate which authorized services over a route in western Iowa extending to Omaha, Neb. The condition which the Commission attempted to impose would have prohibited Rock Island from performing through services between certain key points, such as Omaha, Neb.; Des Moines, Iowa; Davenport and Bettendorf, Iowa; and Rock Island and Moline, Ill. While in the instant case, the Commission has not attempted to impose a keypoint restriction, the effect of this Order finding the rates proposed to be unlawful because they are beyond the scope of the operating rights, has the effect of prohibiting Appellant from transporting property through Chicago, Ill., thus establishing, for all practical

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purposes, Chicago as a keypoint. Both the Texas and Pacific Motor Transport Co. and the Rock Island Motor Transit Co. applied to the Courts for injunctive relief from the Orders of the Interstate Commerce Commission imposing such conditions and, in both instances, the injunctive relief was granted.

The Court, in the *Texas and Pacific case,* supra, stated, in part, as follows:

> "(b) The last question is whether, after having permitted the acquisition of these certificates, the Commission may issue orders which stifle and, in reality, destroy the value of such certificates. No one learned in the law could permit an affirmative answer to that question. It is a taking of private property without due process.
>
> ". . . nor can revocation be accomplished in any way except under Section 212. It cannot be brought about by the imposition of terms and conditions, or limitations. The Commission itself, said in *Quaker City Bus Co.—Purchase—Black Hawk Lines,* 38 M. C. C. 603, that 'the existence of a certificate creates a vested motor carrier status which stays in force and effect . . . until that certificate is revoked in accordance with the procedure described in Section 212(a).'
>
> "If we give the Commission power to revoke, by terms, limitations, and conditions, by an attempted stretch of Section 208(a), then we make Section 212(a) utterly useless. Each section has its purpose. Each section expresses the intent of Congress. Such intent must govern."

While in the instant case Appellant's operating right is a permit rather than a certificate, such permits are recognized in the law governing motor carriers and are a valuable property right the same as certificates of public convenience and necessity; and while, in the instant case, the Commission has not attempted to impose a restriction in the operating permit, itself, its Order finding the rates proposed to be unlawful is just as effective as a partial revoca-

tion of the permit as would be such a limitation or restriction. The Order of the Commission, therefore, stifles and in reality destroys the value of the permit. It is, therefore, as was found in the *Texas and Pacific case,* supra, a taking of private property without due process. "It is confiscation. It is destruction. It is arbitrary." Furthermore, the Commission in this instance, by stretching the powers granted to it by Congress under Section 218 of the Act is making utterly useless the provisions in Section 212(a) and is, therefore, acting directly contrary to the express intent of the Congress.

The Court, in granting the injunctive relief sought in the *Rock Island case,* said:

> "It is apparent that the proceedings covered by the Order of April 11, 1941 (those which imposed the conditions) were reopened to execute a new policy as expressed in the *Texas and Pacific case,* and that the Commission failed to observe these recognized limitations, whereas here, the action of the Commission in the reopened proceedings results in a material change in plaintiff's certificates and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute. *I. C. C.* v. *Seatrain Lines,* 329 U. S. 424; *United States* v. *Pennsylvania R. Co.,* 242 U. S. 208; *I. C. C.* v. *C. N. O. and T. P. R. Y. Co.,* 167 U. S. 479. No such power is apparent from this record and this is not a proceeding under Section 212 of the Interstate Commerce Act."

What the Commission is here attempting to do is to impose a condition upon Appellant's right to purchase which was not imposed in its original Order. This is apparent from a recent decision of the Commission authorizing Appellant to purchase other operating rights. In *Milton Ratner and Bernard A. Lipson—Control; The Emery Transportation Company—Purchase (Portion)—C. J. Davis,* Docket No. MC-F-4227 (January 26, 1950), Not Printed, the Commission stated:

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". . . Nothing herein contained is to be construed as authorizing any enlargement of the existing rights, or as authorizing vendee to render through single-line service through a combination of its present rights with those acquired . . ."

This language was not included in the Report and Orders of the Commission approving the purchases by Appellant of the operating rights of Nowak Trucking Company and Midwest Transfer Company of Illinois. The Commission in the instant case, is attempting to give effect to this policy as expressed above. In so doing, it is making a material change in Appellant's permit and operating rights and a partial revocation of such rights. There is nothing in the Interstate Commerce Act, Part II, which gives the Commission the power to so partially revoke Appellant's permit. For this reason, the Commission's Order violates the Fifth Amendment to the United States Constitution.

Appellees, in their Motion to Affirm fail to make a proper statement of the issues before the Court. However, even if we accept the issue as stated by appellees, it is quite apparent that there are involved substantial questions which should be reviewed by the Supreme Court of the United States.

In support of their argument that there are no substantial questions involved in the instant case, Appellees propose that the Commission in *Service of Contract Carriers*, 49 M. C. C. 103, held that a contract carrier cannot combine together operating rights purchased with those already held for the purpose of performing a through transportation service over such rights. In arriving at this conclusion, it was necessary for the Commission to make a judicial interpretation of certain sections of the Interstate Commerce Act. The interpretation and application of the law made by the Commission in *Services of Contract Carriers*, supra, has never been reviewed by the Courts. Accordingly, the issue here involved is a novel one involving substantial questions and should be the subject of judicial review.

The very fact that the Commission attempts to use its decision in *Services of Contract Carriers* as authority for holding the rates involved in the instant case to be unlawful, raises a substantial question of law. The decision of the Commission in *Services of Contract Carriers*, supra, was made as a result of a petition filed with the Interstate Commerce Commission in which the Contract Carrier Conference of the American Trucking Associations, Inc. was the petitioner and requested the Commission to make a general rule covering this subject, pursuant to the provisions of Section IV(b) of the Administrative Procedure Act, which section outlines the procedure which is to be followed by administrative bodies, including the Interstate Commerce Commission, in making general rules applicable to persons subject to regulation. The Commission denied the petition and refused to establish a general rule pursuant to the Administrative Procedure Act, upon the basis that the question had already been decided in individual cases before the Commission.

Had the Commission, in the application of Appellant to purchase the operating rights of Midwest, imposed a restriction against using the unified rights for the purpose of performing a through transportation service and cited, as authority for so doing, other cases wherein the same restriction had been imposed, the question before the court would have been limited solely to the issue whether the Commission, under the Interstate Commerce Act, has authority to impose such a condition or restriction. If the Commission had established in *Service of Contract Carriers* a general rule pursuant to the provisions of the Administrative Procedure Act and then in the instant case attempted to apply that rule to the rights purchased by Appellant, the issue before the Court would simply have been whether a general rule of this kind could have been given retroactive effect, but the Commission did not take either course of action. It imposed no condition or restriction in Appellant's right to purchase the authority of Midwest and it has not estab-

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lished a general rule pursuant to the provisions of the Administrative Procedure Act, but has attempted to give previous decisions in individual cases the dignity of a general rule applicable to all contract carriers. In the instant case, therefore, the question is raised as to whether the Interstate Commerce Commission, in establishing general rules, must follow the provisions of the Administrative Procedure Act or whether it may establish such rules in any individual case which comes before it.

Appellees also contend that there are no substantial questions involved in the issue presented by the case because in *Noble* v. *United States*, 319 U. S. 88, the Court held that the Commission, pursuant to its authority to specify in a permit "the business of the contract carrier covered thereby and the scope thereof," gives it the power to describe "the exact and precise character of the service to be rendered." While it may be that, under the authority of the *Noble* case, supra, the Commission may describe in a permit "the exact and precise character of the service to be rendered," it does not follow that if the Commission does not impose in one of its Orders any restrictions on the right of a contract carrier to buy operating rights of another contract carrier, that it may, in a subsequent case, find a proposed operation to be unlawful on the basis that it would have been had it imposed such a condition in the original grant of authority. In short, in the instant case the Court has before it the legal question as to whether the Commission may impose a restriction which it is here attempting to do, when it has not put the restriction in either the Order authorizing the purchase of the rights, or in the permit which was issued after the purchase was consummated, and has not promulgated any general rule governing the situation.

Appellees, in further support of their contention that there are no substantial questions involved in the issues presented to the Court, point out that in *Acme Fast Freight* v. *U. S.*, 309 U. S. 638, this Court affirmed a decision of a District Court which held, in effect, that Section 216 (c) of

the Act (49 U. S. C. 316 (c)) applies only to common carriers. *Acme Fast Freight* v. *U. S.*, 30 F. Supp. 968, 973. In the *Acme case*, supra, the question before the Court was whether Freight Forwarders who were not regulated as carriers could enter into joint rates and through routes with common carriers by motor vehicle. This issue is not presented to the Court in the instant case. However, the Commission, in *Services of Contract Carriers*, supra, did make mention of the fact that the Interstate Commerce Act is silent with respect to the right of contract carriers to enter into joint rates or through rates. While this is true, does the silence of the Act on this question imply that contract carriers may not enter into joint rates or through routes one with another? Here again is another substantial question which must be decided in connection with the issue which Appellees contend is before the Court in the instant case. Under the common law, a contract carrier or private carrier for hire could do anything that a common carrier could do, except hold out to serve the general public. Undoubtedly, prior to the passage of the Motor Carrier Act, two contract carriers could perform a through service under joint or multiple rates, if they so desired. As previously stated, there is nothing in the Interstate Commerce Act which prohibits contract carriers from continuing to do the same thing. Appellees take the position that the silence of the Act on this point amounts to a prohibition. This, of course, is contrary to all rules of statutory construction, for the repeal or diminishing of common law rights is never to be accomplished by implication but only by clear or unambiguous statutory language. See *McCarthy* v. *McCarthy*, 20 App. D. C. 195; *Tinker* v. *Modern Brotherhood of America*, 13 F. 2nd 130. See also *Sutherland—Statutory Construction*, Sections 6201 and 6206.

As their final argument that the instant case presents no substantial questions of law, Appellees cite the *United States* v. *Rosenbaum Truck Lines, Inc.*, 315 U. S. 50, and quote therefrom a statement of this Court which says, in

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effect, that problems of statutory construction must be decided on the intention of the enacting body and that Congress intended for common carriers to obtain certificates of public convenience and necessity from the Interstate Commerce Commission, and contract carriers, permits from the same body. Appellants do not contend in this action that they need not have a permit from the Interstate Commerce Commission in order to perform the services in the rate schedule involved in this case. Its contention is that it does have a permit which authorizes this transportation service. It is the contention of Appellees that the permit held by Appellant does not authorize these services. It is up to this Court to determine whether Appellant may perform the services provided for in the rates which the Commission found unlawful under the authority which it purchased from Nowak Trucking Company and Midwest Transfer Company which the Commission authorized it to unify into one operating permit.

The instant case is of extreme importance to Appellant because it is presently handling traffic from Jeffersonville through Chicago to points in Wisconsin and such business is very profitable. For it to have to forego this particular operation would mean the loss of very substantial revenues to its business and would, in a large part, destroy the value of the operating rights which it has purchased. The issue that is here presented to the Court involves several very substantial legal questions. In fact, the entire controversy revolves around an interpretation of the statute. While the Lower Court issued a judgment and decree, it did not issue an opinion in this matter. For this reason, there has been no authoritative judicial interpretation.

Conclusion.

The Interstate Commerce Commission, having specifically permitted and authorized appellant to unify the operating authority herein under consideration, the issue to be decided is whether, having done so, the Commission in

another proceeding can prohibit the combining of the operating rights. Appellant respectfully represents that such action on the part of the Interstate Commerce Commission is not lawful because:

1. The words "unify" and "combine" are synonomous, both in fact and law.

2. A permit granted to a contract carrier constitutes a valuable property right of the same nature as a Certificate of Public Convenience and Necessity.

3. Having once authorized a unification, the action of the Commission in prohibiting performance of through transportation under a permit amounts to a taking of property without due process of law.

4. Had the Interstate Commerce Commission intended at the time the permit was granted that through transportation was not to be performed over this authority, the language of the grant of authority would have specifically excluded such through transportation as is consistently done when the Commission so intends.

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The appeal thus presenting substantial questions, it is, therefore, respectfully submitted that the Motion to Affirm should be denied.

Dated April 18, 1950.

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Certificate of Service.

I certify that a copy of the foregoing reply to the Motion of Appellees to Affirm, was served on counsel of all parties of record by mail this 18th day of April, 1950.

CLARENCE D. TODD.